

Decision 00-12-005 December 7, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FLORSHEIM BROTHERS,

Complainant,

vs.

PACIFIC GAS AND ELECTRIC COMPANY,

Defendant.

Case 96-05-049
(Filed May 30, 1996)

O P I N I O N

This decision grants Utility Design, Inc. (UDI) an award of \$35,669.00 from the Advocates Trust Fund (ATF) in compensation for its contribution to Decision (D.) 98-09-058.

1. Background

D.98-09-058 is the final decision in the above-captioned complaint brought by Florsheim Brothers (Florsheim) against Pacific Gas & Electric Company (PG&E). In its complaint, Florsheim alleged that PG&E violated PG&E Gas Rule 15 by failing to give refunds to line extension applicants for gas trenching costs

incurred by applicants who provide the trench used in joint utility installations.¹ In D.98-09-058, the Commission found in Florsheim's favor.

PG&E was ordered to refund to Florsheim certain gas trenching costs and to make appropriate adjustments to the electric portion of these trenching costs. The Commission concluded that Gas Rule 15 made PG&E responsible for all gas trenching costs. The Commission encouraged PG&E to make refunds for gas trenching costs to other similarly situated applicants for line extensions. PG&E subsequently advised the Commission that it decided to make refunds for the period beginning July 1, 1995, to customers for the gas share of the Rule 15 joint electric trench. The criteria set forth in D.98-09-058 would be used in making refunds. PG&E also instructed its offices to prospectively apply Rule 15 as ordered in D.98-09-058. (See UDI Request for Compensation from the Advocates Trust Fund (Request), Exhibit B.) In Gas Advice Letter 2111-G, PG&E outlined a plan to refund gas trenching costs on approximately 2,600 projects. As of February 1, 1999, the total amount of refunds made was \$6,389,052. PG&E estimated that the total amount ultimately refunded would be less than the \$25 million originally estimated, but was unable to give an exact estimate. (See Request, Exhibit C.)

2. Procedural History

UDI is an engineering firm that designs utility line extensions within PG&E's service territory. It states that it has acted as agent for over 100 developers in negotiating with PG&E for refunds on installed facilities. UDI

¹ Joint utility installations typically consolidate gas, electric, telephone, and cable extensions in a single trench (joint trench).

made a motion to intervene in the Florsheim complaint, Case (C.) 96-05-049, on October 24, 1997. This motion was granted by the assigned Administrative Law Judge (ALJ).

On September 9, 1999, UDI filed its Request. This document was timely filed pursuant to the June 11, 1999, Ruling of ALJ Maloney, and the extension of the filing deadline granted by ALJ DeUlloa on July 22, 1999. UDI there requests an award of \$39,399 for its contributions to D.98-09-058.

PG&E filed a Response to UDI's Request (Response) on October 12, 1999. PG&E opposes UDI's Request on a number of bases. It argues that UDI was not the complainant in the complaint case, that it has not proven that it made a substantial contribution to the outcome of the case, and that it has not proven there was no convenient means to obtain payment for its efforts from other sources. UDI filed a Reply to PG&E's Response (Reply) on November 5, 1999.

3. Requirements for Awards from ATF

The rules governing administration of the ATF and the criteria for granting awards from the ATF are set forth in the "Declaration of Trust" (Declaration) dated October 11, 1982. Prior to execution, this document was approved by the Commission in D.82-05-009 and D.82-08-059. The language of the executed Declaration was subsequently modified in D.92-03-090.

The Declaration, Section 1.2, provides that the ATF is created to defray expenses related to litigation of consumer interests in "quasi-judicial complaint cases." The complaint brought by Florsheim falls within this category. Because this threshold requirement is met, the UDI Request will be evaluated to determine if it meets the criteria for an award.

The criteria to be considered in determining eligibility for an award are set forth in the Declaration, Sections 1.3 and 1.4. Section 1.3 provides that an award

may be granted only where the private party has made a "direct, primary, and substantial contribution" to the result of the case. Fees will be awarded where (1) complainants have generated a common fund that is not adequate to meet reasonable attorney or expert witness fees; (2) a substantial benefit has been conferred upon a party or members of an ascertainable class, but no means are available for charging those benefited with the cost of obtaining the benefit; or (3) where complainants have acted as private attorney general in vindicating an important principle of statutory or constitutional law, but no other means or fund is available for award of fees.

Section 1.4 provides an award will be based upon consideration of four factors: (1) the societal importance of the public policy vindicated; (2) the necessity for private enforcement and the magnitude of the burden on the complainant; (3) the number of people standing to benefit from the decision; and (4) the magnitude of the party's own economic interest in the litigation. Fee recovery is allowed even if a party has an economic interest in the proceeding if the Commission finds good cause for an award.

3.1 Contribution to Resolution of Case

The Declaration, Section 1.3, provides that attorneys fees may be awarded only where it is clearly and convincingly demonstrated that the private party has made a direct, primary, and substantial contribution to the result of the case. In its Request, UDI points to the Commission's discussion in D.98-09-058 as evidence of UDI's contribution. Upon review of the decision, we concur with UDI that the participation of UDI made a direct, primary, and substantial contribution to the decision. As a company that provides design services to developers of residential subdivisions, UDI was able to provide valuable technical information to the Commission regarding design, construction, and

costing of joint trenches, and their ownership and operation after construction. UDI provided information that was not otherwise readily available to the Commission, and also was able to confirm information presented by the complainant. Information provided by UDI is summarized in D.98-09-058, pp. 5-6.

UDI argued that PG&E decided, as of July 1, 1995, that the gas portion of the trench has a "zero" value and allocated the gas occupancy percentage to the electric portion of the trench. UDI explained that in fact gas facilities use and occupy a portion of the trench for which they should be charged. The Commission was persuaded by this argument, which was central to its conclusion that there can be no "free riders" in the joint trenches. It was this conclusion that caused the Commission to order PG&E to refund to Florsheim the gas trenching cost portion of the joint trenches constructed by Florsheim. This Commission action, based upon UDI's argument, led to PG&E making retroactive refunds of gas trenching costs, and to prospectively implementing Gas Rule 15 in a manner consistent with D.98-09-058.

We reject PG&E's contention that UDI's contribution was not primary or substantial because UDI was not the complainant in the case. The Declaration does not limit availability of compensation from the ATF to complainants. Section 1.3 of the Declaration refers to the "private party" in the litigation. It utilizes the identifier "complainant" in identifying the contribution that the private party must make to qualify for an award. We find the word complainant to be used for illustrative purposes, and not intended to limit ATF awards to the complainant who initiated the complaint case. This interpretation is consistent with the ATF's purpose of making compensation available for representation of consumer interests. In a complaint case the focus of the complainant may be

limited to his or her own recovery, though the case may raise broader consumer issues. Representation of the broader consumer interest in the complaint case may fall to an intervenor in the proceeding. If otherwise eligible to receive an award from the ATF, we do not believe that it is consistent with the goals of the ATF to deprive an intervenor of the opportunity for compensation simply because it did not file the original complaint.

We disagree with PG&E's reasoning that UDI's contribution was not direct, primary, and substantial because the quantity and length of its discovery, testimony, and briefs was less than that of Florsheim. Volume of filings and testimony is not the criterion upon which we determine the value of a party's participation. Furthermore, we do not agree with the implication in the Response that only one party can make a direct, primary and substantial contribution to a proceeding. The Declaration's criteria are simply not limited in the ways that PG&E suggests.

3.2 No Means of Charging Costs of Obtaining Benefit to Benefited Class

Section 1.3 provides three ways to demonstrate eligibility for an award. UDI meets the second of these, which reads as follows: "Fees will be awarded from the ATF where a substantial benefit has been conferred upon a party or members of an ascertainable class, but no means are available for charging those benefited with the cost of obtaining the benefit..." As a result of UDI's contributions in the proceeding, the Commission issued an order that caused PG&E to cease violating Gas Rule 15. As a result developers and builders in PG&E's territory will not be deprived of trenching cost refunds or future cost reimbursement that they are due under Gas Rule 15. This is a benefit that has been conferred upon an ascertainable class (developers and builders of past and

future projects who apply to PG&E for gas trenching refunds or cost reimbursement), but there is no means available for charging UDI's litigation expenses to this class. As of February 1, 1999, PG&E had made refunds for 913 past projects. The developers and builders who are entitled to a refund or reimbursement of future costs are an ascertainable class, but there is no means of recovering UDI's expenses from the members of this class. We reject PG&E's argument that UDI is not eligible for an award because its clients who have received refunds could have paid UDI's expenses. UDI's eligibility for an award is based upon the fact that an ascertainable class, broader than its own client base, benefited from UDI's participation.

3.3 Section 1.4 Requirements

The Declaration, Section 1.4 provides that an award will be based upon consideration of four factors. The first factor is the strength or societal importance of the public policy vindicated. In this case, PG&E effectively changed Gas Rule 15 when it refused to issue refunds due to developers and builders. By our decision we enforced the important public policy that a utility may not change its Gas Rules without prior Commission approval. The importance of enforcing this policy, and the resultant refund of monies wrongfully withheld, make this case one in which compensation from the ATF is justified.

The second factor to be considered is the necessity of private enforcement and the magnitude of the burden on the complainant. In this case private enforcement, initiated by Florsheim and further pursued by UDI, was necessary to bring PG&E's misapplication of Gas Rule 15 to the attention of the Commission. While Florsheim was awarded a refund in D.98-09-058, UDI was not entitled to compensation from PG&E because it is not a developer or builder

who was wrongly denied a refund. The burden of funding its litigation costs (UDI claims \$39,399) is substantial in light of the fact that UDI could not expect an award if complainant prevailed.

The third factor to be considered is the number of people standing to benefit from the decision. The number of people standing to benefit is substantial, pointing to the appropriateness of an award to UDI. As a result of our decision, developers and builders involved with as many as 2,664 past projects may receive refunds. An indeterminate number of future developers and builders will receive gas trench refunds in the future for so long as Gas Rule 15 remains in place. It is possible that purchasers of properties in the projects may ultimately benefit as well if the refunds result in a reduction of purchase prices.

The final factor to be considered is the magnitude of a party's own interest in the litigation. An economic interest in the litigation is not a bar to an award, if the Commission finds good cause for granting an award. In this case UDI did not participate with any expectation of receiving an award in the decision. PG&E points out, however, that UDI may stand to benefit from the decision because its clients are residential developers who stand to obtain refunds and reimbursement of future costs from PG&E. PG&E argues that "...anything it can do to increase its [UDI's] visibility in the market enhances its bottom line." (Response, p. 6.)

While it is possible that UDI's participation may have enhanced its business, we have no basis for quantifying the economic advantage to UDI. In view of the fact that PG&E has identified 2,664 projects for review as Gas Rule 15 projects, and had made refunds in 913 projects as of February 1, 1999, we conclude that UDI's economic interest should not bar its recovery from the ATF.

Even assuming that UDI experienced economic advantage from its participation in the proceeding, the benefit that it provided to others outweighs the benefit that it may have personally received and establishes good cause for granting an award.

4. Reasonableness of Requested Compensation

UDI requests compensation in the amount of \$39,399 as follows:

Expert's Fees

Roger L. Poynts, P.E.	(33.5 hours at \$165/hour)	=	\$ 5,527.50
Walter Antonio, Jr.	(5.0 hours at \$125/hour)	=	\$ 625.00

Attorney's Fees

Connie D. Easterly	(185.9 hours at \$175/hour)	=	<u>\$32,532.50</u>
Total Expert and Attorney Fees		=	\$38,685.00

Paralegal/Administrative Staff

(13 hours at \$50/hour)	=	\$ 650.00
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Additional Costs

Courier Charges	=	<u>\$ 64.00</u>
Total Compensation Requested	=	\$39,399.00

4.1 Hours Claimed

UDI documented the claimed hours by presenting a daily breakdown of hours for Poynts, Antonio, Jr., and Easterly. A breakdown of the 13 hours claimed, for paralegal and administrative staff is also provided. For all hours claimed, detailed information is provided regarding the tasks performed. The hourly breakdown presented by UDI supports its claim for total hours. The hours spent on the identified tasks appear reasonable.

We note that Easterly's time spent working on the compensation request is billed at the full hourly rate for work on September 7, 8, and 9, 1999. In D.98-04-059, we reaffirmed our conclusion that compensation requests are essentially bills for services and do not require an attorney's skill to prepare. Parties will be compensated for an attorney's time in preparing a request for compensation at half the attorney's hourly rate. (*Id.*, p. 51.) Accordingly, we reduce the amount of the award to reflect payment at half Easterly's hourly rate for 26 hours on September 7, 8, and 9, 1999. We have considered the reasonableness of the amount of hours spent on this task and recognize that the number of hours spent is high. In light of the fact that UDI participated over the course of a number of years in several proceedings on related issues, we recognize that it may have been necessary to spend time allocating hours between cases. We appreciate UDI's effort at clearly segregating the hours spent on this proceeding, and we conclude the hours spent in preparing the request were well spent.

We make one other minor adjustment to the award to reflect a reduction in hourly rate for travel time. UDI has claimed Easterly's full hourly rate for four hours of travel to the Commission on August 18, 1999, to obtain documents from Central Files. We have previously directed that travel time shall be billed at one-half of the hourly rate. (See D.98-04-059, p. 51.) UDI does not break down the four hours between travel and activities at the Commission, and it is not possible to determine if the task could have been more efficiently performed by paralegal or administrative staff. We will allow the full amount of hours spent by Easterly, but will compensate this time at one-half the hourly rate.

Lastly, UDI seeks compensation for 13 hours of paralegal and administrative staff time. UDI indicates that these hours include clerical,

accounting, and paralegal time. Separate fees for administrative and clerical assistance are not granted where the principals receive professional level fees. Professional fees assume overheads and are set accordingly. (See D.98-11-049.) Because no breakdown of time between the three activities is provided, we assign one third of the total hours to each task. We will grant compensation for one third of the time expended for a total of 4.3 hours, representing the amount of time attributed to paralegal tasks.

With the exception of the items described above, we find the hours billed to be reasonable and fully compensable.

4.2 Hourly Rates

UDI seeks an hourly rate of \$165 per hour for the services of expert Poynts. It states that Poynts has received expert witness fees in civil lawsuits at the rate of \$150 per hour for general preparation and \$200 per hour for preparation and attendance at depositions and trial. It argues that the \$165 per hour rate is "in line with" the rates charged by similarly qualified individuals in other Commission proceedings, but provides no examples. The work performed by Poynts was in 1997 and 1998. We find the rate of \$165 per hour on the very high end of expert fees granted to intervenors during that time period. We note that in D.98-05-014, Dr. Dick Hughes-Hartogs was awarded expert fees of \$120 per hour for work performed in 1997. In D.98-12-006, we awarded The Utility Reform Network (TURN) \$145 per hour for the work of expert W. Marcus in 1998. Both of these experts were familiar with the issues before the Commission and had participated in past proceedings. In light of Poynt's licensing as a civil engineer, land surveyor, and general contractor, we will set the hourly rate for Poynts at \$145 per hour for work performed in 1997 and 1998.

An hourly fee of \$125 is sought for the work of Walter Antonio, Jr. in 1998. Antonio contributed expert knowledge regarding gas trenching based upon past experience as an employee of PG&E. He was employed by PG&E for 24.5 years, 12 of which were spent on gas installation and maintenance crews. UDI states that Antonio's normal hourly rate for utility contract review and utility consulting services is \$150 per hour. We find the requested \$125 per hour rate reasonable in light of Antonio's specialized experience with the subject matter of this case.

The rate sought for Connie D. Easterly, Esq., is \$175 per hour for services in 1997, 1998, and 1999. Easterly is an attorney and a Certified Public Accountant with 12 years' experience. We agree with UDI that \$175 is a reasonable rate for Easterly's services, and we will adopt this rate. As pointed out by UDI, this rate is within the range awarded to TURN and Utility Consumers' Action Network (UCAN) for the services of associate attorneys in 1995-1996.

Lastly, UDI requests an hourly rate of \$50 per hour for paralegal staff. We find this rate reasonable and will adopt it. We utilized this rate in D.95-05-018 for comparable services.

4.3 Other Costs

The only additional cost itemized by UDI is \$64 for courier charges for filing of brief(s) with the Commission. In the future, UDI should provide additional explanation regarding the date(s) when miscellaneous costs are incurred. Where the cost is for an item such as use of a courier service, an explanation should be provided why such an expensive means of delivery was utilized. We will allow the expense in this case, given that UDI has not sought to

recover any other miscellaneous expenses, and it is possible that courier delivery was necessary to meet tight filing deadlines.

5. Award

We award UDI \$35,699.00 for its contribution to D.98-09-058. The award is calculated as follows:

Expert's Fees

Roger L. Poynts, P.E.	(33.5 hours at \$145/hour)	=	\$ 4,857.50
Walter Antonio, Jr.	(5.0 hours at \$125/hour)	=	\$ 625.00

Attorney's Fees	(155.9 hours at \$175/hour)	=	\$27,282.50
	(30 hours at \$87.50/hour)	=	<u>\$ 2,625.00</u>

Total Expert and Attorney Fees	=	\$35,390.00
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Paralegal Staff

(4.3 hours at \$50/hour)	=	\$ 215.00
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Other Costs

<u>Courier Charges</u>	=	<u>\$ 64.00</u>
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<u>Total Compensation Award</u>	=	\$35,669.00
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As in all intervenor compensation decisions, we put UDI on notice that the Commission staff may audit UDI's records related to this award. Thus, UDI must make and retain adequate accounting and other documentation to support its claim for an award from the ATF. UDI's records should identify specific issues for which it requests compensation, the actual time spent by each employee, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation is claimed.

6. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. No comments were filed.

Findings of Fact

1. UDI made a timely request for an award from the ATF.
2. The technical information and technical arguments provided by UDI pertained to issues that were central to the Commission's decisionmaking in C.96-05-049.
3. UDI made a direct, primary, and substantial contribution to D.98-09-058.
4. As a consequence of UDI's participation, a substantial benefit has been conferred upon builders of projects who are eligible for refunds from PG&E under Gas Rule 15, but no convenient means are available for charging those benefited with the cost of obtaining the benefit.
5. This case vindicated an important public policy.
6. Private enforcement of the issues litigated in this case was necessary to bring the issues to the attention of the Commission.
7. The burden to UDI of funding its participation is substantial in light of the fact that it did not stand to receive an award from PG&E if it prevailed on issues in this case.
8. The number of people standing to benefit from UDI's participation is substantial.
9. Any potential economic advantage that accrued to UDI as a result of its participation in this proceeding is outweighed by the benefit to others, and should not bar an award to UDI from the ATF.

10. The hours claimed by UDI in its Request appear reasonable.

11. With the exception of time spent by Easterly on August 18, September 7, 8, and 9, 1999, and the time expended by administrative staff, the hours claimed are compensable at full hourly rates.

12. Time spent by Easterly on fee request preparation is billed at the full hourly rate in the Request. This time, 26 hours, falls within the category of services that do not require a lawyer's skill. This time should be compensated at half of Easterly's hourly rate.

13. Time spent by Easterly for travel to the Commission on August 18, 1999, to obtain documents from Central Files is billed at Easterly's full hourly rate in the Request. Four hours should be compensated at half Easterly's hour rate on the basis that travel time and retrieval of documents are not activities that require an attorney to exercise the skills that justify the full hourly rate.

14. With the exception of the hourly rate requested for expert Poynts, the hourly rates requested by UDI are consistent with the rates applied for work by similarly experienced persons in past Commission proceedings. It is reasonable to apply the hourly rates requested for Antonio, Jr., Easterly, and paralegal staff. The rate requested for Poynts is higher than rates granted to experts similarly familiar with issues before the Commission during the same time period. Instead, the hourly rate of \$145 per hour applied in D.98-12-006 for expert W. Marcus is a reasonable rate for Poynts in 1997 and 1998.

15. The miscellaneous other costs incurred by UDI in this proceeding appear reasonable.

Conclusions of Law

1. UDI has fulfilled the requirements of the Declaration of Trust which governs awards of compensation from the ATF.

2. UDI should be awarded \$35,669.00 for its contribution to D.98-09-058.
3. This order should be effective today, so that UDI may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. Utility Design, Inc. is awarded \$35,669.00, to be disbursed from the Advocates Trust Fund, in compensation for its substantial contribution to Decision 98-09-058.

2. This proceeding is closed.

This order is effective today.

Dated December 7, 2000, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

CARL W. WOOD

Commissioners